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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 967

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

ARTHUR J. RIEGER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit dated January 17, 1964.

OPINION BELOW

The opinion of the Court of Appeals is printed in Appendix B hereto, *infra* p. 18, and is reported in 326 F. 2d 329.

JURISDICTION

The judgment of the Court of Appeals was entered January 17, 1964. Rehearing was denied February 27, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Where (i) a complaint contains no specific allegations of negligence, and (ii) the evidence has developed no specific issues of negligence, and (iii) the defendant must make its only argument prior to the plaintiff's argument, can a defendant in an FELA case, over its protest, be forced to proceed to argument without knowledge of the charge of negligence to be submitted to the jury?

STATUTES INVOLVED

The statutes involved are Sections 51-54 of Title 45, United States Code, commonly referred to as the Federal Employers Liability Act. Also involved is Rule 51 of the Rules of Civil Procedure for District Courts of the United States. Each is printed in Appendix A, *infra* pp. 15 through 18.

Also involved is Section 546.11, Minnesota Statutes, relating to the order of trial, printed in Appendix A.

STATEMENT

The parties are referred to as plaintiff and defendant, their titles in the trial court.

Plaintiff was employed by defendant as a section laborer (R. 8). On November 29, 1960, he and members of his crew were assigned the task of going to a point along the track of

defendant near Revillo, South Dakota (R. 8), to load and bring in to defendant's depot at that place a quantity of large timbers or beams that had been used in some bridge reconstruction work. These were lying on the ground near one end of the bridge (R. 9). Some were on each side of the track (R. 9). The crew had a motor track car, two small push cars, and a device called a "crab" (R. 9)—consisting of a small adjustable crane or boom which could be revolved around a central vertical mast affixed to a track push car (R. 9). A photograph of this is Exhibit A at R. 25. A cable and pair of tongs were suspended from the outer end of the crane. Raising and lowering of the cable was accomplished by mechanical power (R. 9); but the crane itself was rotated around the mast manually (R. 9, 36).

On the day of the accident, plaintiff himself was the pilot of the operation during the course of which his injury occurred. This consisted in loading the beams, one by one, onto the two push cars. The first timber was 9 x 18 inches in size and 28 feet long (R. 33) weighing some 1,300 pounds (R. 54). Plaintiff affixed the tongs at the exact center (R. 26), signalled the cable to be drawn (R. 26), and pushed the crane or boom around over the push cars; it was thereupon lowered on to them (R. 9, 26) on plaintiff's own signal (R. 26); but as one end of the timber was on the crab (R. 27), and in order to slide the timber off the crab and along the push cars, plaintiff then removed the tongs and re-attached them at a point closer to the crab, in order to slide the timber (R. 26). He then signalled the cable to be raised; his signal was obeyed; but instead of the timber sliding, the mast rotated to the side and the timber came into contact with his knee, causing the injury for which he brought this suit.

It is undisputed that everything was done in the usual and customary way (R. 26, 30); the operation was one with which plaintiff was thoroughly familiar (R. 24). There had never been any trouble before (R. 29). The entire movement and operation was carried on under plaintiff's direction and by his own signals (R. 27). The swinging of the timber toward plaintiff was probably due to the fact that the track at the place in question was on a curve; and, being banked for the curve, one rail was necessarily higher than the other (R. 56). It had snowed or sleeted the night before. The entire morning had been spent in shoveling away the snow (R. 9, 23); and plaintiff, at the time of his accident, was standing on a place which he himself had shoveled down to the bare ground (R. 23). He thought, however, that in attempting to dodge the swinging boom and timber, he may have slipped (R. 28).

No specific claim of negligence was asserted, either in the testimony or the pleadings. The evidence completely failed to develop any specific act or omission on the part of the petitioner which presented any basis for a charge of negligence to be submitted to the jury. Under Minnesota practice each side argues once to the jury and the defendant argues first. Section 546.11 (4), Minnesota Statutes. Counsel for defendant therefore requested the Court to require the plaintiff's counsel to specify, before argument began, what claim of negligence was being asserted. (R. 64-65). The trial court not only refused this request, but, in submitting the issue of negligence, restricted to the jury, did so exclusively as follows (R. 71):

> "First, was the defendant negligent in respect to the matters which are claimed to have caused the accident? * * *"

This is all there is as to what the defendant was charged with. What these matters are can be ascertained only from the argument of plaintiff's counsel which had not yet occurred when defendant was compelled to argue. The complaint says nothing. There were some pretrial interrogatories in which again defendant had sought to learn specifically with what it was charged; again, a series of platitudes, but even if the answers had said anything, they would, of course, be valueless after the evidence was closed. The result is a position, surely unique, where the Court deferred to *plaintiff's counsel* to define the issues upon which the jury was to reach its findings.

Even after the arguments, at no point in the charge did the Court indicate that the jury could consider this or that act or omission as negligence; thus leaving the entire submission in the sphere of platitudes mostly innocent in themselves, but completely disassociated from the facts of the case. In fact, from a reading of the charge alone, it would be impossible to know even what the case is about, other than it is against a railroad and under the F.E.L.A. (R. 71)

As to any specific act or omission the defendant is charged with, there was nothing whatever.

As previously noted, in accordance with Minnesota State Court practice the defendant is compelled to argue first to the jury and is followed by the plaintiff with no right of rebuttal. Defendant, under this method of submission, was able to learn with what it was charged only after the opportunity to answer the charge had passed. Exceptions to the Court's ruling and to the charge were, of course, duly reserved.

In the Court of Appeals, defendant assigned as error the refusal of the trial court (a) to direct a verdict, (b) to give

certain requested instructions, and (c) to define the issues to be decided by the jury, so that the matter could be discussed intelligently in argument to the jury. Only the last is involved in this petition; and, as to this, the Court of Appeals disposed of the point upon these theories:

(FIRST) That the matter had not been preserved on appeal because the printed record did not contain the arguments to the jury. (Opinion, p. 12; *supra* p. 29)

(SECOND) That the court below did "define the theories of negligence" in this case. (Opinion, p. 12; *supra* p. 29)

(THIRD) The question for decision was "whether the trial court should have defined the factual situation" upon which negligence could be based. (Opinion, p. 12; *supra* p. 29)

(FOURTH) That the instructions were "not a mere general or abstract charge." (Opinion, p. 11; *supra* p. 28)

The Court of Appeals thereupon found that there was a jury issue as to "whether reasonable prudence would require doing the work in a manner to compensate for the weather and curve in the track" (Opinion, p. 7), and that "a jury could find that these required a deviation from normal in order to have a reasonably safe place to work" (Opinion, p. 7). There thus exists, for the first time, a delineation of the issue or issues which a jury could have been authorized to decide. However, there was no evidence whatever as to what, if any, compensation or deviation was even possible; or, if possible, was desirable without entailing greater risks or would have affected the course of events in even the slightest degree.

REASONS FOR GRANTING THE WRIT

Petitioner did not have a fair trial.

The trial court procedure, tolerated by the Court of Appeals with some very obvious misgivings, goes to the very heart and essence of a fair trial. In a criminal case the accused is entitled as a matter of constitutional right (Amendment VI) to be informed "of the nature and cause of the accusation". This is not a criminal case and does not fall within the scope of the Sixth Amendment, but the concepts of what constitutes a fair trial and fair procedure are no different in civil law than in criminal law. As the Third Circuit said in *United States* v. *Chandy* (3rd Cir. 1953, 204 F. 2d 624):

> "Thus, regardless of the merits, the establishment of the essential issues in a civil or a criminal case must be after reasonable notice and opportunity to be heard if the procedure is to meet standards of due process."

The trial amounted to this: there was no specific act or omission on the part of the defendant that was or could be submitted to the jury as being below, or constituting any departure from, the proper standards of due care. According to the plaintiff himself, everything had been done, both by him and his fellow employees, in the normal and customary way. At the close of the evidence defendant requested that it be informed as to what, in tangible terms, and beyond negligence as a mere abstraction, it was charged with.* This was denied. Then followed the arguments to the jury, pursuant to the state court order of argument (defendant first, plaintiff last):

*The complaint merely alleged (R. 1):

> III
>
> The injuries to plaintiff were accidentally caused and the accident and injuries were caused by the negligence of defendant.

and then the court's charge. Thus, when the defendant argued, it had not the faintest idea of what was going to be claimed that it should have done or should not have done. Indeed, plaintiff's counsel may well have made the decision of what to claim after defendant's counsel had finished his argument. The trial court defined negligence in abstract terms only, and then merely left it to the jury to say whether defendant was negligent or not, without in any way even telling or instructing the jury as to what act or omission or combination of them might be considered as negligent.

The prejudice resulting from compelling a party to argue blind before he even knows what he is charged with, is obvious. The language of this Court in *Anderson National Bank* v. *Luckett*, 321 U.S. 233, 246, 64 S. Ct. 599, 606, would appear to be particularly appropriate:

> "What is due process in a procedure affecting property interests must be determined by taking into account the purposes of the procedure and its effect upon the rights asserted and all other circumstances which may render the proceeding appropriate to the nature of the case. Davidson v. New Orleans, 96 U.S. 97, 107, 108, 24 L.Ed. 616; Ballard v. Hunter, supra, 204 U.S. at page 255, 27 S.Ct. at page 266, 51 L.Ed. 461; North Laramie Land Co. v. Hoffman, supra, 268 U.S. at pages 282, 283, 45 S.Ct. at page 494, 69 L.Ed. 953; Dohany v. Rogers, supra, 281 U.S. at page 369, 50 S.Ct. at page 302, 74 L.Ed. 904, 68 A.L.R. 434, and cases cited. The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. If that is preserved, the demands of due process are fulfilled. Measured by this standard, we cannot say that the present notice is insufficient."

The procedure in the trial court thus amounted to a denial, in time to be heard on the subject, of the right to know with what a party is charged, and in what manner (even in the most general terms) the jury was to be instructed upon that subject. Certainly a lawyer is entitled to know to what subject his remarks to the jury should be addressed. Rule 51 of the Rules of Civil Procedure is designed specifically to give counsel a right to know what the issues are and which, if his client's rights are to be protected, he must discuss; and certainly the policy and purpose of that rule is and should be applicable to the fundamental right to know with what his client is charged. As Barron and Holtzoff say in their work (*Barron and Holtzoff, Federal Practice and Procedure*, Vol. 2B, pages 448-449, § 1102):

> "The rule requires the court to inform counsel of its proposed action on the requested instructions before they make their arguments to the jury. *This is intended to permit counsel to argue intelligently upon the evidence, within the framework of the applicable law as the court will give it to the jury*, and it serves the additional purpose of alerting counsel to make appropriate objections following the charge. At the same time the rule, salutary as it is, is not meant to be a trap for the judge nor an indispensable ritual for all cases. Thus the inadvertent failure of the judge to give this information to counsel does not require a new trial or reversal on appeal, *except in those cases where counsel have been prejudiced by the failure.*" (Emphasis added.)

Nothing could possibly be more prejudicial than refusal to inform counsel of the nature of the charge against his client, in time to argue it; and at every possible stage of the case petitioner protested violently against being compelled to argue in the dark.

Apparently the point was never really understood by the Court of Appeals: That court says:

> "The defendant argues that it was handicapped in argument by reason of the court not defining the issues. This point was not perfected on appeal as the record on the argument was not presented to the Appellate Court. In any event, discovery procedures, not the courts comment on the evidence, is what is designed to prevent counsel from surprise. It was not shown wherein the appellee's counsel argued any facts as a basis for negligence which were not in the record and warranted by the law." (Opinion, p. 12; *supra* p. 29)

The reason that the argument for counsel for plaintiff was not put in the record is that no misconduct was claimed; and the point was not so much what *plaintiff's* counsel said to the jury nor even what defendant's counsel said to the jury; but rather what defendant's counsel was never given the chance to say that deprived defendant of a fair trial. The fact is that *defendant's* counsel was compelled by the court's ruling, to make himself ridiculous in the eyes of the jury by discussing a subject not yet defined—and which, in fact, never was defined by the trial court, but only by plaintiff's counsel in his, the final, argument.

The Court of Appeals answers the point here involved by saying that negligence may be found from conduct as a whole, and need not be dismembered into specific units of conduct, citing *Union Pacific R.R. v. Hadley*, 246 U.S. 330, and *Blair v. B&O R.R.*, 323 U.S. 600. The correctness of this is not challenged; but it leads to no conclusions in this case. To use a homely illustration: It is not negligent *per se* to drive an automobile; neither is it negligent *per se* to have the lights not burning in a car. But to do both together on a public highway at night may be negligence of the grossest kind. Of

course, it is true as this Court said in the *Blair* case that various elements may be so interwoven as to form a single pattern; but here the single pattern is an exact conformity by defendant and also plaintiff, who was in charge of an operation, with everything commonly done being followed as it had in the past without adverse consequences; and no specific act or omission, nor sufficiency of equipment, can be pointed to as being remiss. While, as the Court says in the *Hadley* case, the whole may be greater than the sum of its parts, here neither the whole nor any of its parts presents any case where it is possible to say that a different course of conduct should have been pursued; or, if one existed, what it was.

The completely nebulous nature of the submission is aggravated by the court's failure, even after the arguments, to define the issues; so that we never have discovered what the negligent act found by the jury was, and to this day we do not know. Although the prejudice is obvious, the Court of Appeals did not allude to it.

Under the statute, 45 United States Code, Section 53, contributory negligence on the part of the plaintiff is a partial defense, the extent of which is measured by comparing the degree of fault on the part of one party, with that of the other. If it is never known what the defendant did that was said to be negligent, there is no possible way of applying the comparative negligence formula which the statute imposes; for, with what is the negligence of the plaintiff to be compared, in order that a balance may be struck and the damages modified as required by statute? The court did charge the jury generally, on comparative negligence; but, of course, that is meaningless unless the acts involved can at least be identified.

It is acknowledged that, where a general verdict is returned, it is a proper basis for reversal, where one erroneous issue was submitted to the jury along with the proper issues. *Roth* v. *Swanson* (8 Cir.), 143 F. 2d 262. Under the unique method applied here by the trial court, it is conceptually possible to say that the defendant can never claim an erroneous issue has been submitted to the jury because nothing has been submitted at all. In the reality of the trial-room every possible issue of negligence conceivable in any one of the jury's minds was in fact submitted, whether based on any evidence or not, no defendant can meet every possible idea of negligence that may lurk in any one of twelve minds. To require the defendant's counsel to undertake such impossible task without any definition of the negligence to be submitted is to prevent the defendant from having a fair trial.

In summary then, the writ should be granted for the following reasons:

1. Because the issue presented is an important one of practice and procedure in the federal courts, going directly to the heart of the question of whether or not a party to receive a fair trial under federal procedure.

2. Because the judgment below is, for all practical purposes, in violation of the provisions of the Federal Employers Liability Act, particularly 45 United States Code, Section 53.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

45 United States Code, Sec. 51

LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE; DEFINITION OF EMPLOYEES

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carriers, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered

as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

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45 United States Code, Sec. 53

CONTRIBUTORY NEGLIGENCE; DIMINUTION OF DAMAGES

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.

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45 United States Code, Sec. 54

ASSUMPTION OF RISKS OF EMPLOYMENT

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury

or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

Rule 51, Rules of Civil Procedure

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Section 546.11, Minnesota Statutes

ORDER OF TRIAL.

When the jury is completed and sworn, the trial shall proceed in the following order, unless for special reasons the court shall otherwise direct:

* * * (4) When the evidence is concluded, unless the case be submitted by one side or both without argument, the defendant shall open and the plaintiff close the argument to the jury; provided, that if the defendant have the affirmative of the issue to be tried the foregoing order of trial shall be reversed."

APPENDIX B

Opinion of Court of January 17, 1964

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17,292

Chicago & North Western Railway Company, Appellant, v. Arthur J. Rieger, Appellee.	Appeal from the United States District Court for the District of Minnesota.

[January 17, 1964]

Before VAN OOSTERHOUT and BLACKMUN, Circuit Judges, and HANSON, District Judge.

HANSON, District Judge.

This action was brought under the Federal Employers' Liability Act to recover for injuries received by the appellee, a railroad employee, near Revillo, South Dakota. The action

is predicated on the negligence of the appellant railway company.

The accident occurred when a large wooden beam was being loaded on to some track cars. Appellee was a part of the crew performing this operation. The track was a single one running east and west. The loading was being done at a curve where the south rail was higher than the north rail. There were beams on both sides of the tracks but the one involved was a 9" x 18" one, 28 feet long, located on the north side of the track. The accident happened while the first beam was being loaded. There was ice and snow on the ground. It had been snowing and sleeting the night prior to the accident. The place of the accident had been shovelled.

The equipment which was to be used to move the beams was a "crab" or small crane on wheels and two push cars. The first beam was loaded on to the push cars, but because it, as loaded, was resting partly on the crab, the employees tried to use the crab to slide the beam and get it off the crab. The end of the beam resting on the crab was raised by the crane. The idea was that this would cause the beam to slide forward away from the crab. Instead, the beam slid forward about 12 inches and then swung sideways and hit the appellee.

The case was submitted to the jury. The jury found for the appellee and the railroad appealed to this court.

The railroad raised and argued four points:

1. Some evidence of negligence is still a requisite in cases under Federal Employers' Liability Act.

2. There is no evidence of negligence on the part of the defendant.

3. The court erred in (a) failing to define the issues and (b) refusing defendant's requested instructions that would have done so.

4. The court erred in deferring to counsel on the nature of the issues submitted.

With respect to whether or not some evidence of negligence is a requisite in cases under the Federal Employers' Liability Act will not be discussed because the appellee admits, and correctly so, that some evidence of negligence is a requisite in cases under the Federal Employers' Liability Act.

The second issue is whether or not there was evidence of negligence on the part of the railroad sufficient to submit the case to the jury. The trial court submitted specifications of negligence as to whether the railroad failed to use reasonable care to provide the appellee with a reasonably safe place to work and whether there was an insufficiency, due to the negligence of the railroad, in its cars, appliances, machinery, road beds, or other equipment.

There was ample evidence to sustain both of these grounds of negligence. There would appear to be more evidence of insufficient equipment than any other type of negligence, but the jury would also be permitted to find that, under the circumstances of the case, permitting the loading of the beams at a point where there was a curve and the tracks were not level constituted negligence.

There was also evidence of weather conditions which would bear on the issues of negligence submitted to the jury. Requested Instruction No. 5 read as follows:

> "5. You are instructed as a matter of law that there is no evidence in this case from which you could find that the defendant Railway Company was negligent in failing to provide a safe place to work because of the snow and ice conditions existing at the time and place

> where plaintiff sustained his injury, or because of the condition of the ground where plaintiff was working, or the condition of the stringers which the plaintiff was engaged in moving."

In *Texas & Pacific Ry. Co.* v. *Behymer*, 189 U.S. 468, Holmes, J. held that the slippery condition caused by the ice, if known, had a bearing on the duty of the railroad company to its employee if there was a reasonable way for the railroad to decrease the danger caused by the weather conditions. *McGivern* v. *Northern Pac. Ry. Co.*, 132 F.2d 213 (8th Cir.) is consistent with that view. In the *McGivern* case, there was nothing shown by which the railroad could have lessened the danger resulting from the snow. The court there said that the danger did not in itself imply negligence. In that case, sand, ashes, and salt were available to improve the conditions. In *Raudenbush* v. *Baltimore & Ohio R.R.*, 63 F.S. 329, the rule was correctly given. The railway has the duty to furnish sufficient instruments, sand, gravel, salt, etc., to decrease the danger from the ice and snow if this can reasonably be done. To the same effect are *Fugazzi* v. *Southern Pac. Co.*, 208 F.2d 205, and *Lilly* v. *Grand Trunk Western Railroad Co.*, 317 U.S. 481.

The *McGivern* case does not hold, as stated in the *Raudenbush* case, that a railroad is not liable to its employees for injuries resulting from climatic conditions. That case does hold that there must be some showing of negligence on the part of the railroad in not lessening the danger caused by the climatic conditions before negligence can be imputed to the railroad on this ground.

Probably the *McGivern* case was not impliedly overruled by the *Lilly* case as they involve different factual situations.

However, in the *Lilly* case, the court said there is an absolute and continuing duty to maintain the locomotive and all parts and appurtenances thereof in proper condition and safe to operate without unnecessary peril to life or limb. The court was talking about ice. In this connection see *Collins v. Southern Pacific Company*, 286 F.2d 813 (9th Cir.).

In the present case, it is only necessary to say that the court was correct in leaving to the jury the question of whether the weather conditions were a factor on this issue of the alleged negligence of the railroad, and correct in refusing requested instruction No. 5.

The defendant in the last sentence of requested instruction No. 7 asked the court to charge the jury that a temporary dangerous working condition resulting from the weather is not by itself a negligent failure on the part of the carrier to provide the employee a safe place to work. A number of courts have made this statement. *McGivern v. Northern Pac. Ry. Co.*, supra; *Missouri Pacific Railroad Company v. Ivby*, 275 U.S. 426; *Detroit T. & I. R. Co. v. Banning*, 173 F.2d 752.

The defendant's request was not correct for several reasons. (1) The temporary character of the condition is not a factor which in and of itself has any significance. *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 353; *Anderson v. Elgin, Joliet and Eastern Railway Co.*, 227 F.2d 91. The duty to use reasonable care is a continuing one not relieved by fleeting circumstances. *Missouri Pacific Railroad Company v. Ivby* was criticized in *Tiller v. Atlantic Coast Line R. Co.*, 128 F.2d 420. Insofar as *McGivern v. Northern Pac. Ry. Co.*, supra, and *Detroit T. & I. R. Co. v. Banning*, supra, relied on the criticized portion of the *Ivby* case, they are open to the same criticism. This is the second reason why this request

was improper. It might have misled the jury to believe that the appellee assumed some risk of a temporary condition which would not be assumed in a permanent condition. Of course, the temporary nature of the condition might bear on whether or not the railroad could reasonably do anything to improve the condition.

The third reason that the proposed instruction was not correct is that the word "temporary" is a relative and comparative term, *Worthington* v. *McDonald*, 68 N.W.2d 89, 246 Iowa 466, and under the present record it would have to be defined if used in an instruction. Of course, this does not completely answer the question as to whether the refusal of this request was improper, because even if a requested instruction is not entirely perfect, it may in some situations impose upon the court the duty to give a more specific instruction on a particular issue where it soundly appears that such an instruction is needful to enable the jury to intelligently determine the question. *Chicago & N.W. Ry. Co.* v. *Green*, 164 F.2d 55; *Chicago, Rock Island & Pacific Railroad Co.* v. *Lint*, 217 F.2d 279. This requested instruction, however, was not of the type contemplated by the rule. This was a negative instruction to tell the jury that an issue was not in the case rather than to tell the jury that an issue was in the case. *Consolidated Electric Coop.* v. *Panhandle E. Pipeline Co.*, 189 F.2d 777. It would include some comment on the evidence and this is addressed to the court's discretion. *Virginian Ry. Co.* v. *Armentrout*, 168 F.2d 400. It might have tended to influence the jury to accept evidence of the defendant as against that of the plaintiff. *Jack* v. *Craighead Rice Milling Co.*, 167 F.2d 96. For these reasons, it must be held that the court did not abuse its discretion in refusing the last sentence of requested instruction No. 7.

The defendant cites *Texas & Pacific Ry Co.* v. *Behymer*, supra, for the principle that the customary procedure is presumptively proper. What the court said in that case is: "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." That case has been cited many times for that point. See *Chicago, Rock Island & Pacific Railroad Co.* v. *Lint*, supra, and *Sears, Roebuck and Co.* v. *Daniels*, 299 F.2d 154, 159 (8th Cir.). In *Schillie* v. *Atchison, Topeka & Santa Fe Railway Co.*, 222 F.2d 810, doubt was raised about the admission of evidence that no accidents in the past had occurred as a result of the customary operation. The *Lint* decision was said to be based on Minnesota law. Whether or not this was an issue of substantive law making state law inapplicable was not discussed. However, this was not critical to the determination in the *Lint* case and is not critical to the decision in this case. It is sufficient to say that under the circumstances reasonable prudence would require doing the work in a manner to compensate for the weather and the curve in the track. The jury could find that this required a deviation from normal in order to have a reasonably safe place to work and to be reasonably sure that the equipment would work in a sufficient manner.

The defendant discusses some factors which are claimed to have put the cause of the injury upon the appellee's actions. The Federal Employers' Liability Act is a comparative negligence act. Unless it can be said that the appellee's alleged negligence was as a matter of law the sole cause of the injury, then the court would have to inquire into the sufficiency of the damages. This court has declined to do that: *Solomon Dehydrating Company* v. *Guyton*, 294 F.2d

439. In this case, it cannot be said that the defendant's acts constituted as a matter of law the whole cause of the accident. There was little evidence of negligence on the part of the appellee. He was not the foreman. *Atlantic Coast Line v. Davis*, 279 U.S. 34, does not stand for the position urged by the defendant. In that case, the injured person voluntarily abandoned the safe position on the running board which he at first assumed and placed himself in a position of extreme danger. Manifestly, that rule does not fit the facts of the present case. Also, in *Atlantic Coast Line v. Davis*, supra, there was a question whether the injured person was an employee of the railroad. Also, the court found no evidence of negligence on the part of the railroad. In the present case, it would be of no particular significance that the appellee knew of the condition because he had to work in the dangerous area and he doesn't assume the risk of his employment.

The defendant's third point in this appeal raises the question of whether the court erred in failing to define the issues and in refusing the defendant's requested instructions. The defendant states that its requested instructions Nos. 1, 4, 6, and 11 were given, that the substance of No. 2 was given, and that probably the sense of Nos. 9 and 12 were given by the trial court. Clearly, the evidence did not warrant the giving of requested instruction No. 8 nor No. 5. Requested instruction No. 7 was improper and not warranted by the evidence.

Requested instruction No. 3 paraphrased was a request that the jury be instructed "that negligence must consist of some specific act or omission." In this respect, the court charged the jury that: "Negligence is the doing of something which a reasonable person would not do, or the failure to do something which a reasonable person would do under the circumstances." It is difficult to see what the defendant

means when it says that the important part of requested instruction No. 3 was refused. The paraphrased part was set out in the defendant's brief, and undoubtedly the part considered important by the defendant. This was in substance given by the court. The court used the word "something" instead of the words "any act or omission." The court must only set out the law in a form not misleading to the jury. The instruction the court gave was the model instruction. Jury Instructions and Forms for Federal Civil Cases, by Hon. William C. Mathes. Also, the trial court's definition was a definition of negligence which has been approved in many Federal Employers' Liability cases. See *Eckenrode v. Pennsylvania R. Co.*, 164 F.2d 996; *Tiller v. Atlantic Coast Line R. Co.*, supra; and 45 U.S.C.A., Section 51, Note 29, and cases cited therein. Negligence in this type of case is determined by federal law. *Sicarist v. Delaware, Lackawanna & Western R. Co.*, 263 F.2d 616. It is not necessarily the same as common law negligence. *Slaughter v. Atlantic Coast Line Railroad Company*, 302 F.2d 912; *Owens v. Chicago, Rock Island and Pacific Railroad Co.*, 292 F.2d 696.

As to requested instruction No. 13, the court did charge the jury that the properties where the plaintiff would discharge his duties did not have to be maintained in a perfect condition. This language was also requested in No. 6. The court instructed on this point by saying that the past experience respecting a device may properly be drawn up. The court further told the jury that the insufficiency of the equipment had to be due to the negligence of the railroad. Thus, the court amply covered the substance of requested instruction No. 13.

Requested instruction No. 10 reads:

"In measuring the standard of care, it is not fair to

take a point of view after the accident and impute negligence from the light of after-events. In measuring the standard of care, the point of view to be taken should be that before the accident occurred to see what, in the light of the facts then known, should have been anticipated".

In instructing on this point, the court said:

"Whether or not a duty has been violated depends upon the risks of the situation, the dangers known or reasonably to have been anticipated, and all of the existing circumstances.

"In measuring the duty to anticipate—that is, in considering how much and how far the defendant railroad company ought to go in foreseeing and guarding against possible mishaps—the past experience respecting the device or situation in question may properly be drawn upon."

Request No. 10 was not a correct statement of the law. The railroad's duty is not limited to anticipating dangers that it knows of only, but must anticipate dangers also from facts which reasonably it should have known. *Chicago, Rock Island & Pacific Railroad Co. v. Leat*, supra, may have some bearing upon requested instruction No. 10 in that in that case an identical instruction was requested. The court there while acknowledging that the requested instruction was not a model one, did say that it was substantially correct and that the substance thereof should have been given by the trial court. The court pointed out that the standard is "know, or by the exercise of due care should have known". This is a correct statement. *Kinghuser v. Chesapeake & Ohio Ry Co.*, 354 U. S. 901. The words of the requested instruction "as in the light of the facts then known, should have

been anticipated" would not be quite right. Therefore, the court in the *Lint* case did not require that the requested instruction be accepted verbatim and in this case it was not error not to accept the instruction verbatim. The requirement is that the court give the substance of the requested instruction if it soundly appears that the instruction is needful to enable the jury to intelligently determine the question. The court did correctly give the substance of requested instruction No. 10.

The court also instructed the jury that in measuring the duty of the defendant to anticipate, it was the past experience which was to be drawn on. The court charged that the jury could consider that no accident of this kind had been known to occur in the past as bearing on what should have been foreseen. Whether this was error on the part of the defendant is not before the court.

The defendant claims that the court failed to define the issues, but states that if the court had given the requested instructions, the issues would have been defined. The simple answer to this is that the court did give every requested instruction or the substance thereof except those which were not warranted by the record.

It is the law that as against a mere general or abstract charge, a party is entitled to specific instruction on his theory of defense if there is evidence to support it and a proper request for such instruction is made. *Chicago, Rock Island & Pacific Railroad Co. v. Lint*, supra; *Chicago & N.W. Ry. Co. v. Green*, supra.

In the present case, the instructions were not a mere general or abstract charge. The court did not make undue comment on the evidence, but a court must be careful if it attempts to tie the principles of law to the facts. *Sperber v.*

Connecticut Mut. Life Ins. Co., 140 F.2d 2 (8th Cir.). A charge in a negligence case is always somewhat in the abstract especially in the federal court where specifications of negligence need not be pleaded.

The defendant argues that it was handicapped in argument by reason of the court not defining the issues. This point was not perfected on appeal as the record on the argument was not presented to the Appellate Court. In any event, discovery procedures, not the courts comment on the evidence, is what is designed to prevent counsel from surprise. It was not shown wherein the appellee's counsel argued any facts as a basis for negligence which were not in the record and warranted by the law.

The fourth issue is whether or not the trial court was in error in charging the jury to determine the following: "Was the defendant negligent in respect to the matters which are claimed to have caused the accident?" It is the form or wording of the instruction which is objected to. The defendant realizes some such instruction is usually given. The model instruction states the issue in the terms, "Was the defendant negligent?" Jury Instructions and Forms for Federal Civil Cases, Hon. William C. Mathes. Sometimes the issue is stated: "Was the defendant negligent in the manner charged and explained in the instruction?" This issue covers some of the same subject matter as was raised in the defendant's third contention. The court did define the theories of negligence in this case. The question is whether the court should have defined the factual situation upon which negligence could be based.

In *Union Pacific R.R. Co. v. Hadley*, 246 U.S. 330, the court said

"On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling as to each. But the whole may be greater than the sum of its parts, and the Court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct viewed as a whole warranted a finding of neglect. Upon that point there can be no question."

In *Blair* v. *B. & O. R. Co.*, 323 U.S. 600, the court said:

"The negligence of the employer may be determined by viewing its conduct as a whole. *Union Pacific R. Co.* v. *Hadley*, 246 U.S. 330, 332, 333. And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern; and where each imparts character to the others."

These cases held that the court was not required in this type of case to attempt to delimit the several factual situations wherein the jury may find negligence. Whether a court is required to define the issues may depend on the complexity and the protracted character of the case. There is some discretion in the trial court. Although this presents a close case, it cannot be said that the defendant has shown that the discretion was clearly abused. In *Daugherty* v. *May Brothers Company*, 121 N.W.2d 594, the defendant in that case objected on appeal to the court's enumeration of the issues of negligence. The court there correctly stated the general rule that a trial court must define the issues in the jury instructions. Other cases on this point are: *Alaska Airlines* v. *Oszman*, 181 F.2d 353; *Norfolk & W. Ry. Co.* v.

Trautwein, 111 F.2d 923; *Cherry v. Dealer's Transport Co.*, 64 F.Supp. 682.

The use of the phrase "which are claimed to have caused the accident" might be criticized in allowing the jury to speculate on matters not in evidence. The court must in the instructions limit the jury's consideration to the relevant pleadings and the evidence. The court's charge in this respect may be somewhat remiss. However, the defendant did not produce any jury argument or anything else wherein this instruction could be found to have prejudiced the defendant in this case.

The court's instructions in this case were plenary. They covered all the issues necessary for the jury to decide the questions presented. They included the substance of all the reasonable requests made by the defendant.

Judgment affirmed.

Judgment of January 17, 1964

(JUDGMENT)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17,292

Chicago & North Western
Railway Company,
Appellant,

vs.

Arthur J. Rieger.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MINNESOTA

This Cause came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

January 17, 1964